

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

MICHAEL A. KIRKMAN

Petitioner,

v.

VERMONT DEPARTMENT OF
CORRECTIONS, ET AL.,

Respondents.

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File No. 1:12-cv-261-jgm

ORDER

(Doc. 18.)

The Magistrate Judge's Report and Recommendation was filed April 22, 2013. (Doc. 18.)

The Report and Recommendation is AFFIRMED, APPROVED, and ADOPTED. See 28 U.S.C. § 636(b)(1).

1. Michael Kirkman's Petition (Doc. 4) is DISMISSED without prejudice as unexhausted.

2. The Respondents' Motion to Strike Certain Respondents and Dismiss Certain Claims as Improper (Doc. 8) is GRANTED.

3. The Respondents' Motion to Deny the Petition (Doc. 13) is GRANTED to the extent denial is without prejudice; and

4. The Respondents' Motion to Require Petitioner to Establish Grounds for a Stay (Doc. 8) is DENIED.

Following the issuance of the Report and Recommendation, Kirkman filed an additional memorandum, entitled "Petitioner's Rebuttal to Respondents Supplemental Memorandum," on April 30, 2013. (Doc. 19.) The memorandum responds to the Supplemental Memorandum

Regarding Access to the Courts and Petitioner's Notice of Dismissal that the Respondents filed on March 15, 2013. (Doc. 12.) Much of Kirkman's Response challenges the adequacy of the law library at the prison where he resides. Id. at 1-5. The Response also seeks to stay the Petition, rather than dismiss it. Id. at 6. Kirkman had previously moved the Court to dismiss his petition without prejudice. (Doc. 11 at 1.)

The Court adopts the Report and Recommendation notwithstanding this additional filing. Filed over forty-five days after the Supplemental Memorandum, the Response is untimely. See D. Vt. L.R. 7. The Response has not caused the Court to question the findings in the Report and Recommendation. The Magistrate Judge correctly determined Kirkman had yet to exhaust his state court remedies. (Doc. 18 at 11.) As a consequence, the stay-and-abeyance procedure is not available to him. Id. at 11-12. This conclusion is unaffected by the adequacy of the prison law library.

In light of this additional filing, the Court reviewed the findings in the Report and Recommendation de novo. See 28 U.S.C. § 636(b)(1).

It is further certified that any appeal taken in forma pauperis from this Order would not be taken in good faith because such an appeal would be frivolous. See 28 U.S.C. § 1915(a)(3).

SO ORDERED.

Dated at Brattleboro, in the District of Vermont, this 4th day of June, 2013.

/s/ J. Garvan Murtha
Honorable J. Garvan Murtha
United States District Judge